Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended;	)	CC Docket No. 96-149
	)	
and	)	
	)	
Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	)	

NYNEX COMMENTS

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NYNEX COMMENTS

NYNEX Corporation ("NYNEX"), on behalf of its operating subsidiaries, hereby files its Comments in response to the Notice of Proposed Rulemaking, released July 18, 1996, in this proceeding.[1] This proceeding will establish the primary conditions under which the statutorily-required affiliates of the BOCs may provide domestic and international long distance services originating in the BOC local service area ("in-region" service), as well as certain other services including interLATA information services and

[1] In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, Notice of Proposed Rulemaking, CC Docket No. 96-149, FCC 96-308, released July 18, 1996 ("NPRM").

manufacturing.[2] The Commission has also indicated that it will consider the regulatory treatment afforded the provision of "in-region" long distance services provided by BOC-affiliates and other local exchange carriers ("LECs") in this proceeding. By its determinations herein the Commission will determine whether the BOC affiliates will bring effective competition to the long distance market as contemplated by Congress, or be frustrated by the regulatory strategems of the entrenched interexchange carrier ("IXC") incumbents.

I. INTRODUCTION AND SUMMARY

There can be no doubt about the critical nature of this proceeding. Indeed, the Commission last week declared in the Interconnection Order that "promoting increased competition in telecommunications markets . . . including the long distance services market" is one of the "three principal goals" of the 1996 Act.[3] In earlier describing this "goal," the Commission stated:

> "the 1996 Act provides for the entry of the Bell Operating Companies (BOCs) and their affiliates into the interstate, interexchange market,

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[2] Other important separate proceedings will consider proposed rules for non-accounting safeguards applicable to the provision of telemessaging, electronic publishing and alarm monitoring by the former Bell Operating Companies ("BOCs") and proposed rules for accounting safeguards applicable to all or each of these services. In the Matter of Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, Notice of Proposed Rulemaking, CC Docket No. 96-152, FCC 96-310, released July 18, 1996 ("Telemessaging NPRM"); and, In the Matter of Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996, Notice of Proposed Rulemaking, CC Docket No. 96-150, FCC 96-309, released July 18, 1996 ("Accounting NPRM").

[3] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98, FCC 96-325, released August 8, 1996, at p. 7 ("Interconnection Order").

> after certain preconditions are satisfied. This entry can be expected to intensify competition in the interstate, domestic, interexchange market."[4]

At issue here then is not the Congressional goal, but the attainment of this goal through the regulatory process. Intensified competition in these markets will result in the acceleration of technical development, economic growth, and increased consumer choice, all significant factors in the Commission's role of serving the public interest.[5]

After years of deliberation, the Congress passed and the President signed an epochal amendment to the Communications Act of 1934 ("1934 Act") in February of this year. Entitled the Telecommunications Act of 1996, this law substantially amended the existing 1934 Act, and eliminated the separately binding Modification of Final Judgment ("MFJ"), in order to establish "a *pro-competitive, de-regulatory national policy framework* designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans *by opening all telecommunications markets to competition,* and for other purposes . . . ."[6] (emphasis supplied). By this action, nationwide telecommunications policy shifted from a regime of detailed regulation of different telecommunications markets (e.g., local

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4 In The Matter Of Policy And Rules Concerning The Interstate, Interexchange Marketplace, CC Docket 96-61, Notice of Proposed Rulemaking, FCC 96-123 at ¶ 1, released March 25, 1996, ("Interexchange NPRM")..

5 See, e.g., In the Matter Of Amendment To The Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, IB Docket No. 95-41, Report and Order, 11 FCC Rcd 2429 at ¶¶ 67, 73 (1996).

6 Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. Preamble (1996) ("Conference Report") at 113.

service, long distance, video services) which precluded effective entry and competition by entities participating in other markets, to a less regulated scheme which seeks to encourage competition in each market by all entities.

This Commission has tackled its pro-competitive mission with vigor. It has already dealt in the Interconnection Order with the Section 251 requirements established by Congress to encourage greater competition within the local exchange area by interexchange carriers, cable companies, competitive access providers and others. It has similarly addressed the provision by local exchange companies ("LECs") and others of video services via open video systems.[7] In this critical third prong of its pro-competitive mission, the Commission must establish rules -- as it did in the other proceedings -- for the effective and efficient provision of long distance services by new competitive entrants such as LECs (including BOCs), cable companies and others.[8] In doing so, the Commission should not primarily focus on the interests of market incumbents, but rather on the interests of consumers who are to be benefitted by additional interexchange competition, new services, and choices among service providers and packages:

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7 In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996 - Open Video Systems, Second Report and Order, CS Docket No. 96-46, FCC 96-99, released June 3, 1996; also Third Report And Order And Second Order On Reconsideration, FCC 96-334, released August 8, 1996.

8 Importantly, the Commission has clearly emphasized that it, as well as the prospective entrants, was constrained by the MFJ prohibition. See, e.g., In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorization Therefor, CC Docket No. 79-252 (hereafter "Competitive Carrier"), Fifth Report and Order, 98 FCC 2d 1191, 1197 (1984) (observing that the prohibitions "on interexchange services offered by the Bell Operating Companies (BOCs) and GTE have developed out of antitrust proceedings," not the Commission's own regulatory policies).

> "Enactment of the 1996 Act opens the way for BOCs to provide interLATA services in states in which they currently provide local exchange and exchange access services. Their provision of such interLATA services offers the prospect of increasing competition among providers of such services. BOCs can offer a widely recognized brand name that is associated with telecommunications services, the ability for consumers to purchase local, intraLATA and interLATA telecommunications services from a single provider (i.e. "one-stop shopping") and other advantages of vertical integration. Similar benefits could follow from BOC provision of interLATA information services and BOC manufacturing activities" (NPRM ¶ 6, footnotes omitted).

Our Comments urge Commission action to secure these benefits for consumers. Specifically, NYNEX addresses the issues of joint marketing and providing common support services to the BOC and its affiliate(s), the nondiscrimination provisions applicable to services provided by the BOC to its Section 272 affiliate(s), the provision of interLATA information services by the BOCs, and the form of regulation afforded to the BOC long distance affiliate providing long distance services (Sections II-VI below). In addition, NYNEX addresses changes proposed for consideration to the Commission's information reporting requirements and complaint processes (Section VII, below).

In summary, NYNEX urges Commission action as follows:

Joint Marketing. The 1996 Act expressly contemplates that the BOC and its affiliates may engage in the "joint marketing and sale of services" (Section 272 (g)(3)).[9] The Commission should enable this legislative judgment by permitting the BOC to act as a sales agent in order to sell the services provided by affiliates, as well as to advertise and

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[9] Other subsections of Section 272(g) address the point in time at which, and the requirements under which, the BOCs and their affiliate(s) may commence such joint marketing.

promote such sales, resisting the proposals of competitors to disable this capability. Indeed, it is clear both that these competitors themselves have these capabilities and that Congress itself was mindful of the joint marketing parity that was necessary between the BOCs and their affiliates, and these fully-enabled competitors. Further, the BOCs and their affiliates must necessarily have the ability to use the personnel, support systems and assets which are required to accomplish permitted joint marketing and sales functions, as well as the coordination necessary to market products through the respective sales channels, although the products themselves are separately provided. In acting as a sales channel, the BOC must be able to choose between closing the sale of affiliate services, or referring it for closure to its affiliate.

Support Services. The 1996 Act presupposes a holding company structure, performing corporate governance functions for the BOC, Section 272 affiliate(s) and other owned entities. In addition, although the statute specifically requires that the Section 272 affiliate shall have "separate officers, directors, and employees" from the BOC (Section 272(b)(3)), Congress did not require that either entity forego the economies of scope and scale which are traditionally secured by a multi-product firm through the placement of common administrative functions, including personnel, support systems and facilities, in a separate entity -- whether in the holding company itself or in a service entity subsidiary. The common provision of such services are necessary to the legislative purpose of effective and efficient competitive entry by the BOC affiliate. The

Commission should reject efforts by competitors to handicap such entrants with structural requirements and constraints. Absent legislative direction to the contrary, the Commission should instead continue its pro-competitive approach towards enabling operating efficiencies for the benefit of consumers, while addressing proper cost allocation as necessary through accounting safeguards.[10]

Similarly, the statutory requirement for the BOC and the affiliate to "operate independently" (Section 272 (b)(1)) does not preclude the provision of common governance and administrative support functions to both the BOC and its affiliates. The statutory language simply mirrors the language of the Commission's regulations from the Second Computer Inquiry proceeding.[11] This language has never precluded traditional holding company activities or common support services on a centralized basis. Congress did not elaborate on its use in Section 272, and nothing in Section 272 requires the Commission to modify its past practice and precedent by establishing new regulatory constraints which would impair operating efficiencies.

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[10] The Commission has properly indicated that it will address accounting "safeguards" in response to the Accounting NPRM, and NYNEX will file its responsive comments in that proceeding. Importantly, however, it must be recognized here -- as the Commission has in the past -- that regulatory rules which facilitate operating economies, but focus on proper cost allocation, constitute far better pro-competitive policies than separation rules which preclude such economies. See, e.g., Computer III Further Remand Proceedings: Bell Operating Company Provision Of Enhanced Services, CC Docket No. 95-20, Notice of Proposed Rulemaking released February 21, 1995, 10 FCC Rcd. 8360, ¶ 37 ("The Commission has previously determined that structural separation hurts consumers by creating inefficiencies and slowing or preventing the development of enhanced services, and this finding was upheld by the Ninth Circuit ....").

[11] See 47 C.F.R. § 64.702 et seq.

Nondiscrimination Provisions. In addition to the joint marketing activities authorized and the common support services permitted by the 1996 Act, Congress also specifically authorized the provision of BOC services to the Section 272 affiliate(s) under the terms and conditions outlined in Section 272(c) and (e). The NPRM appears to consider modifying those carefully-crafted Congressional provisions in such a way that these authorized BOC activities will be substantially frustrated or negated entirely in their practical use. Certainly it will be the intent of competitors to urge the Commission in this direction. But, apart from the "accounting principles" to be determined in the Accounting NPRM (Section 272(c)(2)), the statute itself provides all of the required conditions and safeguards. The Commission should refrain from establishing elaborate new regulations or limiting definitions where, as here, the Congressional plan is clear.

InterLATA Information Services. Congress did not require a separate affiliate for the provision of information services, but did for both the provision of interLATA services and interLATA information services. If a consumer separately purchases an information service, the structural safeguard of a separate affiliate is not warranted simply because the consumer happens to use an interLATA service provided by another entity to access the information service. However, if the consumer purchases a combined or bundled service consisting in part of an information service and in part of an interLATA service, the combined service should be considered an interLATA information service

subject to the separate affiliate requirements. This reading is supported by prior activity under the MFJ.

In addition, the Commission asks how it should treat existing regulatory constraints, given the legislative decisions made in the 1996 Act. In doing so, the Commission recognizes that its current regulations may be inconsistent with the 1996 Act or rendered unnecessary by its requirements. This Commission is correct -- much of the current regulatory structure (e.g., CI-II, CI-III and CEI regulations and policies) can and should be eliminated in this and related proceedings as it implements the 1996 Act.

Dominant/Non-Dominant Regulation. With respect to the regulatory treatment of affiliate-provided domestic and international long distance services, the Commission appears properly to be considering these as non-dominant services. All other long distance service providers are afforded such treatment because it serves the public interest. The same should apply to BOC-affiliated new entrants and, indeed, must apply if they are to be effective competitors in the market. The Commission is also correct in its understanding that "dominant" regulatory treatment of the affiliate's services would serve no purpose related to the concerns expressed about the BOC's local exchange services. In short, the affiliate has no market power. In the regulatory environment and competitive marketplace that currently exists, even the concerns about the BOCs advanced by competitors are themselves without substantial basis. This will be far more so the case under the requirements established in the Interconnection Order.

Enforcement Processes. The Commission is also considering additional reports and changes to its complaint procedures as a means to enforce its Section 271 and 272 rules. However, these statutory sections already contain comprehensive provisions which address their enforcement. Further, although the statute enhances the Commission's authority to impose sanctions, it does not warrant a shift of traditional evidentiary burdens to the BOCs from complainants. Such a change would invite the use of regulatory strategies -- instead of marketing acumen and technological innovation -- by competitors seeking to stifle new market entrants. Instead, the Commission must be specific in its criteria for presenting a prima facie Section 271 complaint, so that the total 90-day statutory period for Commission action is available for response and decision. In addition, the Commission should strongly consider prompting the informal resolution of Section 271 inter-carrier disputes by establishing a process which specifically includes ADR procedures.

* * * *

It is critical to the Congressional purpose of increasing competition in the long distance market that the BOC affiliates be permitted to enter the market as efficient and effective competitors. Further, the Commission has assumed just such capability as a cornerstone of its policies in reforming and eliminating BOC access charges. That is, the Commission's access charge transition plan has been made expressly dependent in the Interconnection Order on Commission action herein to establish rules for BOC market

entry under which the "potential loss of access charge revenues faced by a BOC *most likely will be able* to be offset by new revenues from interLATA services."[12] The Commission should enable such strong competitive entry in this proceeding in accordance with the following comments.

II. THE COMMISSION SHOULD AUTHORIZE EFFECTIVE BOC/AFFILIATE JOINT MARKETING IN COMPETITION WITH IXCS, AS AUTHORIZED BY SECTIONS 271 AND 272 OF THE 1996 ACT (NPRM ¶¶ 90-93)

In this Section of the NPRM, the Commission solicits comment on the meaning of various provisions of the Act that govern the BOCs and the largest IXCs in their marketing of local and long distance services. Before commenting on the meaning of these provisions, however, it is helpful first to describe the various marketing activities that a BOC or an interexchange carrier may potentially engage in when marketing local and long distance services jointly. NYNEX believes that these potential marketing activities include, at least:

- Sales Activities - the use of sales channels (i) to make customer referrals, (ii) to act as a sales agent; (iii) to resell services;
- Advertising and Promotion Activities; and
- Other Marketing Activities - product development, product management, market management, channel management, market research and product pricing.

[12] Interconnection Order at ¶ 724 (emphasis supplied).

With these marketing activities in mind, we review below the provisions of the Act that govern the BOCs and the IXCs in their joint marketing of local and long distance services.[13]

A. Section 271(e) Recognizes The Close Competitive Relationship Between IXC And BOC/Affiliate Joint Marketing

Section 271(e) prohibits a large interexchange carrier from jointly marketing its own interLATA service with resold BOC telephone exchange service until certain conditions have been satisfied. The Commission observes that Sections 271(e) and 272(g)(2) (regarding joint marketing by the BOCs, discussed below) "appear to be parallel provisions," and tentatively concludes that the term "market or sell" in Section 272(g)(2) should be construed similarly to the term "jointly market" in Section 271(e) (NPRM ¶ 91).

NYNEX agrees, and the legislative history clearly confirms, that Sections 272(g)(2) and 271(e)(1) were intended to promote parity--at least in part--between a BOC and an IXC in their marketing of local and interLATA services.[14] Thus, Section 271(e)(1) prevents the largest IXCs from joint marketing resold BOC local and their own long distance services in any state until the BOC obtains interLATA relief in such state

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[13] While somewhat related to marketing, there are a number of high-level holding company activities that do not fall within the definition of marketing. These activities include, inter alia, strategic planning and resource allocation, as well as the corporate responsibility for coordination and oversight of all corporate functions and activities, including marketing. These are addressed in Section III, infra.

[14] S. Rep. No. 104-23, 104th Cong., 1st Sess. 23 (1995)(cited in the NPRM at ¶ 91, n.165) (discussing similar provision in the Senate bill).

(or for 36 months, whichever is earlier). Once a BOC obtains relief in a state, the IXC is free to engage in joint marketing; and, in order to maintain parity, Section 272(g)(2) permits the BOC to market and sell the interLATA services of its affiliate.[15]

Section 271(e) clearly prohibits a large IXC from engaging, jointly for interLATA service and resold telephone exchange service, in any of the Sales Activities, Advertising and Promotion Activities and Other Marketing Activities identified above until such time as the BOC obtains interLATA relief (or 36 months from the date of enactment, whichever is earlier). Thus, until the BOC obtains interLATA relief, a large IXC may not: (i) use its interLATA sales channels to resell telephone exchange service, or to make customer referrals to its telephone exchange service sales channel; (ii) advertise and promote interLATA services jointly with resold telephone exchange services; or (iii) perform Other Marketing Activities jointly for its interLATA services and resold telephone exchange services.[16] When the BOC obtains interLATA relief in a particular state, however, the IXC may jointly market its interLATA and resold telephone exchange

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[15] Importantly, the Commission has evidenced an extremely affirmative view of the statutory joint marketing provisions for IXCs in the Interconnection Order, a view which must similarly be applied to the statutory authority for BOCs and their affiliates to engage in joint marketing. See, Interconnection Order at ¶ 328-341 ("[w]e do not believe that we have the discretion to read into the 1996 Act a restriction on competition which is not required by the plain language of any of its sections.").

[16] As posited by the Commission, Section 271(e) would prohibit a large carrier from "advertising the availability of interLATA services combined with local exchange service, making these services available from a single source, or providing bundling discounts for the purchase of both services" (NPRM ¶ 91).

services in such state; and, as discussed below, the BOC may then sell and market its affiliate's interLATA services.

The Commission notes that Section 271(e)(1), on its face, only applies to the marketing by a carrier of telephone exchange service obtained from a BOC "pursuant to Section 251(c)(4)" (NPRM at ¶ 91). Nonetheless, if an interexchange carrier provides telephone exchange service in a particular geographic market and uses at least some resold BOC services as well as its own facilities in providing such service, Section 271(e) would prohibit the carrier's joint marketing within that same geographic market. Thus, an interexchange carrier could avoid the Section 271(e) limitation only if it entirely avoided the resale of a BOC's services in a particular geographic market. No other reading of this limitation would give vitality to the acknowledged purpose of the Congress "to provide for parity among competing industry sectors. . ." (NPRM ¶ 91, n. 165).

B. The Commission Should Allow For Effective BOC/Affiliate Joint Marketing Pursuant To Section 272(g)

Section 272(g) (2) allows a BOC to market and sell the interLATA services of its affiliate after the affiliate enters the interLATA market pursuant to Section 271(d). There is no question that the statutory authority is broad. It is noteworthy, for example, that the Commission asks "whether the joint marketing provision in Section 274(c) has any indirect bearing on how we should apply the joint marketing provisions in Sections 271 and 272." (NPRM ¶ 93). In part, these respective statutory sections deal with considerably different affiliate activities and should be understood to be independent in

their approach to specific joint BOC and affiliate joint marketing activities. But, the descriptions used in 274(c) to delineate the sub-elements of "joint marketing" as a prohibited activity (i.e., "promotion, marketing, sales or advertising"), also serve to illuminate the fully open scope of joint marketing as an expressly permitted activity under Section 272(g).

Instead of adopting this broad approach, the NPRM invites comment from those seeking to limit the authority; e.g., whether, in lieu of allowing BOC personnel to market the affiliate's services at arms length, it is necessary to require a BOC and its affiliate to use an "outside marketing entity" for joint marketing in order to comply with the Section 272(b)(3) requirement that a BOC and its affiliate have "separate officers, directors and employees" (NPRM ¶ 92). However, there is nothing in the legislative history of Section 272(g)(2) that would support the view that an "outside marketing entity" must be used for joint marketing. In fact, a review of the legislative history reveals that Congress intended precisely what Section 272(g)(2) states - that the BOC may market and sell the interLATA services provided by its affiliate. The Conference Report states (at p. 152):

> "New section 272(g)(2) *permits a BOC,* once *it* has been authorized to provide interLATA service pursuant to new section 271(d), to jointly market its telephone exchange services in conjunction with the interLATA service being offered by the separate affiliate in that State required by this section." (emphasis supplied).

Thus, the legislative history clearly contemplates that the BOC itself may market and sell the interLATA services of its affiliate.[17] The question arises, therefore, as to what are the permissible marketing and sales activities that a BOC may perform in the marketing and sale of its affiliate's interLATA services.

As demonstrated by the legislative history, at a minimum, a BOC may use its sales channels to act as a sales agent for, and make customer referrals to its interLATA affiliate. As discussed below, such a Sales Agency/Referral Arrangement would not involve the BOC's resale of its affiliate's services, nor would it involve the BOC's provision of other Marketing Activities (product development, product management, market management, channel management, market research, or pricing) on behalf of its affiliate. The affiliate would provide these Other Marketing Activities itself, and would thus independently develop service offerings and service packages, including the prices for same. For example, the affiliate could purchase wholesale local exchange services from the BOC, and develop a new retail service that would package the affiliate's resold local exchange service with the affiliate's interLATA service.[18] The affiliate could then use the BOC's sales channel, whether an outbound or an inbound sales channel, as agent

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[17] Fully apart from legislative intent, as a matter of statutory construction it is well established that specific terms in a statute (such as the explicit terms of Section 272(g)(2) regarding marketing) prevail over more general terms that might otherwise have applied. See Fourco Glass Co. v. Transmirra Corp., 353 U.S. 222, 228-9 (1957), and cases cited.

[18] As a reseller of BOC services, the affiliate would purchase BOC tariff and other services, including customer support and billing, on the same terms and conditions as other resellers of BOC services.

to sell or "upsell" the new packaged service developed by the affiliate in a manner consistent with applicable CPNI restrictions.

Under the Sales Agency/Referral Arrangement, the BOC would solicit and process end user customer sales orders for its affiliate's services, and/or would make customer referrals, such as "hot key" referrals, to its affiliate. As a sales agent, the BOC would simply sell its affiliate's services at the prices and on the terms and conditions established by its affiliate. In performing the agency activities, the BOC would be free to promote and advertise its agency relationship with its affiliate, and thus to advertise under a single brand name the "one stop shopping" opportunity for customers of the BOC and of the BOC's affiliate.[19]

Consistent with Section 272(b)(5), the BOC and its affiliate would reduce to writing the terms of the Sales Agency/Referral Arrangement, and make such writing available for public inspection. Moreover, the separate affiliate would compensate the BOC for all services in a manner consistent with the pricing of such services to be determined in CC Docket 96-150.[20]

Under the Sales Agency/Referral Arrangement outlined above, the BOC would engage only in the most limited sales and marketing activities necessary to permit the

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[19] It is noteworthy that the Commission has expressly recognized that it is the purpose of the Act to secure this "one-stop" shopping advantage for the customer. (NPRM ¶ 6).

[20] Section 272(g)(3) makes clear that a BOC may decline to enter into similar Sales Agency/Referral Arrangements with unaffiliated providers without violating the nondiscrimination provisions of Section 272(c).

BOC to "market or sell" its affiliate's services as contemplated by Section 272(g)(2). In all respects, the BOC's affiliate would operate independently from the BOC; indeed, the affiliate would continue to provide for itself, separate from and independent of the BOC, the important Other Marketing Activities that a fair reading of Section 272(g)(2) would permit the BOC to provide - product development, product management, market management, channel management, market research and pricing.[21] The Sales Agency/Referral Arrangement is clearly consistent with the language, spirit and intent of the Telecommunications Act, and is essential in order for the BOC to even begin to maintain parity with interexchange carriers, as contemplated by the Act.

C. The Statute Authorizes The Use Of CPNI, With The Customer's Consent, As Proposed By NYNEX

The Commission also seeks comment on "the interplay between the joint marketing provisions in Sections 271 and 272 and the CPNI provisions set forth in Section 222 that are the subject of a separate proceeding" (NPRM ¶ 93)(footnote omitted). NYNEX's position on the CPNI provisions generally is set forth in its comments and reply comments in response to the Commission's Notice of Proposed

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[21] These are the very same marketing functions that the IXC can and will provide jointly for their sale of integrated interLATA and telephone exchange services. A fair view of complete joint marketing parity, therefore, would permit the BOC also to provide these Other Marketing Services for its affiliate. Moreover, while the BOCs are restrained by the judgment of Congress from integrated operations for a specific period of years, there is absolutely no basis for the Commission to consider now extending this competitive restraint (NPRM ¶ 11). Instead it is far more realistic to expect that the *pro-competitive, de-regulatory* purposes of the 1996 Act will require that the Commission earlier consider forbearing from this restraint when "it determines that [the requirements of Section 251(c) and 271] have been fully implemented" (Section 10(d)).

Rulemaking in CC Docket 96-115, and will not be repeated here. With specific regard to the joint marketing provisions, however, several observations are in order.

The Commission has proposed that "local" and "interexchange" services be considered distinct "telecommunications services" for purposes of Section 222 (CPNI NPRM ¶ 22). Absent an applicable exception, a telecommunications carrier could not use CPNI from one of those services to market the other. This restriction would apply equally to the marketing of these services by a single large interLATA carrier or to the activities of a BOC in conjunction with its affiliate.

Section 222(c)(1) does permit a carrier to use CPNI from one telecommunications service to market another "with the approval of the customer." Similarly, Section 222(d)(3) permits a carrier to use CPNI, "either directly or through its agents," "to provide any inbound telemarketing, referral, or administrative services to the customer for the duration of the call, if such call was initiated by the customer and the customer approves of the use of such information to provide such service." These sections should be interpreted to allow a BOC, when acting under a Sales Agency/Referral Arrangement with its affiliate as described above, to use a customer's local exchange CPNI to sell its affiliate's interLATA service to the same customer, or to transfer a customer's local exchange CPNI to its affiliate under a referral arrangement, provided the customer orally consents to such use of the information during the call.[22]

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[22] As NYNEX demonstrated in its CPNI comments, such authorization need not be in writing. Implementation Of The Telecommunications Act Of 1996: Telecommunications Carriers Use Of Customer Proprietary Network Information And Other Customer Information,

III. NYNEX SHOULD BE FREE TO STRUCTURE THE MANNER IN WHICH IT PROVIDES CORPORATE GOVERNANCE, ADMINISTRATIVE, AND OTHER ENTERPRISE LEVEL SUPPORT FUNCTIONS (NPRM ¶¶ 55-79)

The separate affiliate and safeguards provisions of the 1996 Act define when a separate affiliate must be used and limit the ways it and its affiliated Bell operating company ("BOC") may relate to one another. Section 272 establishes separate affiliate requirements for manufacturing activities, origination of interLATA telecommunications services, and interLATA information services provided by a BOC[23] and imposes a non-discrimination requirement on the Bell operating company's dealings with the separated affiliate.[24] The structural and transactional separation requirements applicable to the separate affiliate include:

> "(1) operate independently from the Bell operating company;
> (2) maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the Bell operating Company of which it is an affiliate;
> (3) have separate officers, directors, and employees from the Bell operating company of which it is an affiliate;
> (4) may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the Bell operating company; and
> (5) conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection."[25]

CC Docket 96-115, Notice of Proposed Rulemaking, FCC 96-221, released May 17, 1996, ("CPNI NPRM"); NYNEX Comments filed June 11, 1996 at 15-17.

[23] Section 272(a)(2)(A)(B)&(C).

[24] Section 272(c).

[25] Section 272(b).

The non-discrimination safeguards of Section 272 prohibit a BOC from discriminating between its separate affiliate and other entities in the provision of services or facilities, and define accounting requirements for such transactions.[26] These requirements are discussed in Section IV of these comments.

The fundamental separation requirements of Section 272 are subject to four major exceptions. First, the requirements of Section 272(b), by their own terms, apply to the relationship between the BOC and its separate affiliate(s), and not between a holding company and its subsidiaries. This is more fully discussed below in Section III A, which addresses the language of the Act, and in Section III B and D, which argue that the holding company (or service entity) must be able to provide governance and administrative support services to its subsidiaries without any nondiscrimination obligation. Second, Section 272(g)(2) specifically limits the application of the requirements of Section 272 in the context of BOC marketing of interLATA services provided by an affiliate by a Bell operating company. This is discussed in Section II of these comments. Third, the statute specifically permits a BOC to provide interLATA facilities or services to its separate affiliate, if they are provided on a non-discriminatory basis[27] Finally, neither the structural and transaction rules nor the non-discrimination requirements prevent a BOC from selling any facilities or services to its affiliates, as long as those facilities or services are available to unrelated third-parties on non-discriminatory

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[26] Section 272(c).

[27] Section 272(e)(4).

terms and conditions. The latter two exceptions are addressed in Section IV of these Comments.

Section III C below, demonstrates that a transfer by a BOC of personnel or assets used to provide holding company functions or administrative and support services is not prohibited by the Act, nor does it constitute a transfer or assignment of network capabilities or local exchange operations (NPRM, ¶¶ 33, 70, 79).

These requirements give rise to a series of issues concerning the extent to which both a BOC and its separate affiliate may utilize an array of common functions provided by a holding company entity or by a service entity owned by the holding company. There can be no dispute that overall corporate governance of the entire enterprise is an appropriate holding company function. Plainly, there are strong economic efficiency arguments for not duplicating administrative support functions in both the BOC and its affiliate. The issue is whether anything in the statute, or any policy considerations compel such duplication. A related issue is whether the statute precludes the centralization of administrative support functions outside the BOC and the necessary personnel and asset transfers to provide these functions. A further issue is the definition of appropriate functions which may be centralized outside of the BOC without violating the requirements of Section 272. The NPRM seeks to resolve these issues within a

framework which values BOC entry into previously forbidden markets, protection of ratepayers and protection of competition.[28]

A. The Statute And NPRM Contemplate The Provision of Traditional Holding Company Functions

Section 272 of the 1996 Act contemplates the formation of an affiliate which is structurally and operationally separated from the BOC, but within the structure of the Regional Holding Company. Thus, Section 272 assumes the existence of a holding company entity distinct from the BOC.[29] In addition, Section 272 specifically addresses only relationships and transactions between a BOC and its separate affiliate(s). For purposes of this provision, the definition of a BOC clearly does not include a holding company which owns both a BOC and a separate affiliate.[30] Congress intended Section 272 to establish a clear separation between the BOC (the wireline telephone exchange service entity) and its separate affiliate. Those requirements do not apply to governance and administrative support functions which are performed on behalf of both the BOC and the separate affiliate by the holding company or other subsidiary of the holding company, provided that they do not compromise the operational independence of the affiliate.[31]

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[28] NPRM, ¶¶ 3, 6.

[29] Section 274 of the Act requires the existence of a holding company.

[30] 47 U.S.C. 143(4). Section 3 of the 1996 Act identifies the operating telecommunications subsidiaries of the Regional Holding Companies as the "Bell operating compan[ies]" and includes "any successor or assign of any such company that provides wireline telephone exchange services" but does not include any other affiliate.

[31] It may be argued that this reading of Section 272 would permit functions central to the provision of wireline exchange service to be shared between the BOC and its affiliate through the holding company. This argument ignores the distinction between governance and other

B. The Holding Company Should Be Permitted To Provide Centralized, Enterprise Level Support Functions For Its Subsidiaries

A holding company (or subsidiary service entity) should be able to perform enterprise-level functions required to fulfill its obligations to its shareholders and its board of directors. In addition, holding companies commonly provide enterprise-wide support and administrative services. Nothing in Section 272 precludes a holding company providing these support and administrative services to both a BOC and its separate affiliates nor compels the economically wasteful duplication of such functions.[32]

The language of Section 272(b) is clearly based on the separate subsidiary requirements applicable to the provision of enhanced services and customer premises equipment:

> "(2) Each such separate corporation shall operate independently in the furnishing of enhanced services and customer-premises equipment. It shall maintain its own books of account, have separate officers, utilize separate operating, marketing, installation, and maintenance personnel, and utilize separate computer facilities in the provision of enhanced services."[33]

The influence of the FCC's Rule is clearly evident in the separate subsidiary provisions enacted by Congress, although the provisions are difference in critical

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administrative support services and operating functions, which we do not propose to provide out of the holding company.

[32] Neither the plain language of Section 272(b) nor the legislative history support a conclusion that a holding company providing governance and administrative services is not permitted. There is no reference to such services in Section 272(b) of the Act. In fact, this Section is entirely silent about governance and administrative support. The Report of the Conference Committee is likewise silent on the subject of sharing administrative services.

[33] 47 C.F.R. §64.702(c)(2).